No. 10-1011

Supreme Court, U.S.
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In The
Supreme Court of the United States

WINNEMUCCA COLONY COUNCIL,

Petitioner,

v.

SHARON WASSON and the WINNEMUCCA INDIAN COLONY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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I. RESPONSE TO HISTORY OF PROCEEDINGS RECITED BY THE PETITION FOR WRIT OF CERTIORARI.

The Petition for Writ of Certiorari relies upon a recitation of facts that are not in the record below. The Petitioner's Appendix ("Pet. App.") includes the decision of the Interior Board of Indian Appeals (Pet. App. 8-24) chastising the Regional Office of the BIA for not recognizing a government of this Federally Recognized Tribe which was issued on December 17, 2010, nearly two months after the October 14, 2010 Ninth Circuit Decision. The Petitioner's Appendix also contains letters from Counsel (Pet. App. 185-188) which were not written until well after the Ninth Circuit Decision was issued; thus, Petitioner's Appendix 8-24 and 185-188 should be stricken.[1]

Petitioner's Appendix 47-71, 99-171, 174-179, were also not included in the excerpts of record to the Ninth Circuit and should also be stricken. *Kemp v. Hudgins et al.,* 59 U.S. 530 (1855). Thus, the gratuitous, rambling comments included in Petitioner's History which are unsupported by any record should be disregarded by this court.

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[1] *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 454, 116 S.Ct. 2211, 2232 (1996) (" . . . our power is restricted by the Constitution to the determination of the questions of law arising upon the record."). *Accord, Kirshner v. Uniden Corp. of Am.,* 842 F.2d 1074, 1078 (9th Cir. 1988) (striking portions of excerpts of record that were "neither filed with the district court, considered by the court, nor even before the court when it entered the order that [appellant] now challenges on appeal.").

The relevant history of this case begins with the February 22, 2000 brutal murder (which is yet unsolved by federal authorities) of Glenn Wasson, the Chairman of the Winnemucca Indian Colony, at the Administration Building of the Colony. On that fact, all parties and courts agree. (Petition, page 4, Pet. App. 2, 31) The chronology as set forth in the United States District Court Decision is correct. (Pet. App. 31-34) Bank of America placed the bank account of the Colony into interpleader after two groups claimed that each was the government of the Winnemucca Indian Colony after Glenn Wasson's murder. (Pet. App. 31-33) Then ten years of litigation ensued. (Pet. App. 34)

By late 2000, the members were litigating to prove, on the one hand, their right to assume the government in Tribal Court and litigating the right, on the other hand, to receive the bank account in Federal Court. (Pet. App. 32-34) When the dispute began, an Inter-Tribal Court of Nevada existed, which had been funded by the Bureau of Indian Affairs ("BIA"). (Pet. App. 32) The parties were before the Inter-Tribal Court when they agreed to have a mediator hear the dispute sitting as the Tribal Court because no complete record of any Tribal Court proceeding existed from which the members could properly appeal. (Pet. App. 33) Several weeks of hearing took place. A decision was issued. (Pet. App. 33)

In 2002, at about the same time the decision was rendered by the mediator sitting as the Tribal Court,

one of the other matters in the federal court was appealed to the Ninth Circuit. The parties took it upon themselves, with the help of the Ninth Circuit mediation program, to stipulate to a Court of Appeals consisting of a three judge panel to hear the appeal of the decision rendered by the mediator. (Resp. App. 41, 42 [Supplemental Excerpts of Record, Ninth Circuit Appeal ("SER") 000178]). What is referred to by the United States District Court as the "Minnesota Panel" came from the agreement between the parties pursuant to this mediation at the Ninth Circuit Court of Appeals.[2]

The United States District Court provided a courtroom and the parties argued and briefed the appeal. From that process, the Minnesota Panel issued a decision. (Pet. App. 72-96; Resp. App. 42) Nothing else is relevant or, for that matter, appropriate for consideration since the recitations by the Petitioner are, as stated above, not in the record of this case.

Without a doubt both parties' attorneys signed the agreement for the Minnesota Panel on behalf of their clients. (Pet. App. 33) Any allegations to the contrary are mere excuses for the inability of the Petitioner to face the reality of their loss of this matter from the date of the Minnesota Panel until the

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[2] The Specially Appointed Appellate Panel was generally referred to as the Minnesota Panel because the members of the Panel were from Minnesota. The Specially Appointed Panel consisted of judges from the Sioux Nation. (Pet. App. 33; Resp. App. 42)

date of the filing of this Petition by each and every objective tribunal that has considered these matters.

The Honorable Howard McKibben, United States District Court, District of Nevada, stated that the Minnesota Panel had prepared a well reasoned decision after "a lot of hard work." He also commented that "when parties made an agreement, they needed to abide by that agreement." (Resp. App. 30 [SER 000238])

When Judge McKibben retired to senior status, the interpleader case was assigned to the Honorable Brian Sandoval, who, upon the submission of a Request for Distribution of Account and Dismissal of Interpleader/Supplemental Motion for Summary Judgment issued an opinion on March 6, 2008, distributing the bank account to the Winnemucca Indian Colony, Thomas Wasson, Chairman. After denial of reconsideration, the Bills group appealed Judge Sandoval's decision to the Ninth Circuit, which decision is now the subject of this Petition for Certiorari.

Petitioner appears to raise a criminal defense of ineffective assistance of counsel in this civil matter. This is obvious since newly retained counsel filed a Petition for Panel Rehearing in the Ninth Circuit "in an effort to be afforded the opportunity to rectify these shortcomings and provide the appellate court with a complete and comprehensive record for reconsideration." (Petition, page 10) This is not the

function of a Petition for Panel Rehearing and the Ninth Circuit appropriately denied rehearing.[3]

The truly lamentable aspect of this long litigation is that this matter has continued for over ten years without an enforceable resolution until now. This is a sad commentary on the lack of judicial process available to the small Native American communities of Nevada who must, of economic necessity, depend upon their infrastructure of justice from the Department of the Interior, Bureau of Indian Affairs. The BIA's dissolution of the Inter-Tribal Court of Appeals upon a budgetary whim for over a year during this dispute and the lack of recognition of a government left the United States District Court with the burden of determining how to resolve the interpleader.[4]

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[3] FRAP 35, A party may request a rehearing *en banc* when:

> the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

[4] The District Court recognized that the lack of an appellate court available to the Winnemucca Indian Colony when it was

(Continued on following page)

Each and every federal judicial body that reviewed this case agreed to extend comity to the Minnesota decision, in its entirety. Thus, notwithstanding the fact that Petitioner has failed to file briefs that comply with the Rules of Court,[5] and

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needed for the review of the Tribal Court decision was a denial of their due process rights. The Honorable Howard McKibben expressed his dismay at the BIA's failures:

> There is one thing that's very troubling to me about all of this. I can't, for the life of me, understand why there wouldn't be adequate funding out there to keep a court of appeals alive and well, so that it can decide these issues. And to the extent the BIA doesn't fund something like that, I think that's a travesty . . .
>
> And to the extent my words mean anything, they should always fund something like that. Everybody has the right to go into court. Everybody has the right to an appellate review. And everybody in the colony should have that right. And they should have as much of a right as anybody else in the United States to come into court and have their grievances resolved. And to the extent the BIA or anybody else disenfranchises somebody from not being able to go and do that – I mean, heaven help us if all the funding is cut off from the courts in this country so people don't have some right to assert and protect their constitutional rights.

(Resp. App. 37, 38 [SER 000341, 000342])

[5] Here, the Bills Group did not include an Excerpts of Record with their opening brief. The Bills Group's opening brief lacks appropriate record citations. Had the Wasson Group not filed a Supplemental Excerpts of Record, we would have to scour the district court record for the decisions appealed from and other pertinent portions of the record. Even in the district court record, many of the Exhibits, including vital tribal court rulings, were submitted only in part. For

(Continued on following page)

notwithstanding the fact that Petitioner has failed to live up to the agreements that it entered into to resolve this matter, both the United States District Court and the Ninth Circuit Court ignored these breaches of protocol and advocacy and made their decisions based upon well-reasoned considerations of the facts and the law.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The questions presented in the Petition were never raised or decided in the courts below.

The Petitioner has cited a statutory provision that has not been raised until this appeal. Neither does the statement of the case summarize what, in fact, were the issues in the lower court decisions.

The Petition completely ignores the fact that this Court will not review questions that were not properly

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example, the Bills Group only submitted three selective pages of the Inter-Tribal Court of Appeals's March 19, 2004 decision on the jurisdiction of the Minnesota Panel, and no party provided that decision in its excerpts of record to this court. Due to the complete disrespect for the rules of this court and the rule of law, we seriously considered summarily dismissing this appeal. However, on the unique facts of this case, we concluded that the clients should not be punished for the failings of their attorneys.

Pet. App. 6, 7.

presented to, or decided by, the courts below absent unusual circumstances. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to "allow a petitioner to assert new substantive arguments attacking . . . the judgment [below] when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.")

Throughout the entire ten year litigation in federal court, Petitioner never raised the issues regarding "sovereign immunity" or "trust responsibility" which they now seek to bring before this Court under 25 U.S.C. § 450. As noted above, in the District Court Petitioner argued repeatedly that the decision issued by the Minnesota Panel – a court to which Petitioner expressly stipulated – was incorrectly decided.[6] Then, after the May 7, 2007 Inter-Tribal Court of Appeals order dismissing the case due to a lack of appellate jurisdiction, Petitioner affirmatively argued that it was "entitled to summary judgment

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[6] The closest Petitioner ever came to raising any type of jurisdictional argument was in its Motion for Reconsideration of the District Court's Order, when it argued that a 25 CFR § 11.100 court should hear the matter. (Pet. App. 26-27) However, the District Court correctly noted that 25 CFR § 11.104(b) specifically excluded from such a court's jurisdiction "an election dispute or . . . any internal tribal government dispute." (Pet. App. 27-28)

following the May 7, 2007 order, because that order rendered all litigation before [the Minnesota Panel] null and void. . . ." (Pet. App. 34) Both the U.S. District Court and the Ninth Circuit soundly rejected this argument.

At no time prior to filing the Petition for Writ of Certiorari did Petitioner argue that the federal courts were "interjecting" themselves into the "fray of competing tribal factions . . . in contradiction to policies of self-determination and self-governance under 25 U.S.C. § 450n." To the contrary, Petitioner actively *sought* relief from both the Federal District and Federal Appellate Courts. It was only when Petitioner lost on appeal that it seized on these entirely new arguments in its Petition for Writ of Certiorari.

A "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of the questions presented in the petition," *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). The Court should decline to accept Certiorari where the issues presented have not been properly preserved below.

B. The Ninth Circuit's affirmance of the United States District Court decision was decided correctly.

On March 6, 2008, when the decision granting summary judgment was entered by the United States District Court, District of Nevada, the Court had retained the interpled funds of the Winnemucca

Indian Colony since July 2000. The Court waited patiently for the tribal processes to be exhausted. In a well-reasoned opinion in 2003, the Magistrate for the District Court required that tribal processes be further exhausted, even though the parties had agreed by stipulation to an appeal and agreed to abide by it.[7] That ninety days stretched into five years.

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[7] When the "occupation group (who no longer included William Bills)" failed to abide by the decision, the Magistrate expressed her regret but allowed a further attempt at exhaustion, stating:

> When the court received the stipulated Court of Appeals decision, it seemed as though parties had settled, and that the wait to disburse the money was over. However, despite all of the time and money spent by the parties, it appears that they are determined to prolong this process. The Bills group has challenged the subject matter jurisdiction of the stipulated Court even though the Bills group fully participated in the negotiations to have the appeal heard before that forum. After the stipulated Court of Appeals rendered an unfavorable decision to the Bills group and after payment of $30,847.32 to the stipulated Court of Appeals for its services, the Bills group now raises for the first time the issue of subject matter jurisdiction. Under the doctrine of tribal exhaustion, federal courts must "stay their hand" until tribal courts have had the opportunity to determine their own jurisdiction. . . . Despite the fact that the court is reluctant to extend this case any longer, in the interests of tribal self-determination and self-government, the court will stay these proceedings for ninety days. . . .

Order, Magistrate Valerie Cooke, Dated 2/13/03. (Resp. App. 55, 56 [SER, page 00186, lines 12-22])

"Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis. The Supreme Court itself observed that questions of jurisdiction over Indians and Indian country are a complex patchwork of federal, state and trial law."[8] There are two potential sources of tribal jurisdiction: a tribe's inherent sovereignty and congressional statutory grant.[9] Neither of these issues were pled or used as a defense to the federal court's jurisdiction in interpleader in this case. In fact, the only argument was that the complete exhaustion of Tribal remedies had not occurred because the BIA had in 2003 again funded the Inter-Tribal Court of Appeals of Nevada. In an abundance of respect for Tribal processes and deference to the Tribal court system and because the ultimate question was the determination of the proper recipient of the bank account on behalf of the Tribe, the District Court found that the issue of who was the proper council and membership of the Colony was inherently one over which the Tribal Court had jurisdiction. (Pet. App. 35-37; Resp. App. 55, 56)

Rather than ninety more days of Tribal exhaustion as anticipated by the Magistrate in the Order of February 13, 2003, the Bills' group was given five more years of Tribal exhaustion which included at least two appellate orders, with the final one stating

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[8] *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 936, 937 (9th Cir. 2009) citing *Duro v. Reina*, 495 U.S. 676, 680 n.1, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990).

[9] *Philip Morris USA, Inc.*, cited supra, at page 937.

that the Inter-Tribal Court of Nevada had no jurisdiction over the matter. (Pet. App. 37) There is no Tribal "Supreme Court," there is no further Tribal remedy available after the Specially Appointed Appellate Panel of the Winnemucca Indian Colony (Minnesota Panel) issued its Order and the Inter-Tribal Court of Nevada dismissed any further appeal for lack of jurisdiction.

The District Court did "stay its hand," until Tribal remedies were exhausted on the question of who composed the proper Council to receive the account, stating that the Court recognized the "importance of tribal courts in promoting and encouraging tribal sovereignty." The Court, however, determined that "In this case, the tribal court has had a full opportunity to determine its own jurisdiction. This matter has been pending for over seven years." Only when the Inter-Tribal Court of Appeals entered an Order dismissing the case for lack of jurisdiction, did the United States District Court go forward and correctly determined that "the parties had exhausted all tribal remedies." (Pet. App. 36, 37)

The District Court was deferential to the Tribal Court process, even while it recognized the disingenuousness of the Bills' group who refused to abide by the decision of the Minnesota Panel after their counsel had signed the stipulated agreement in the Ninth Circuit mediation on their behalf. The Tribal exhaustion occurred exactly as the District Court recited in its Order in that the Magistrate allowed a further appeal to the reconstituted Inter-Tribal Court of

Appeals of Nevada which, once again, the BIA had funded by the end of 2003 (Pet. App. 34). The Inter-Tribal Court of Appeals of Nevada determined that it had no jurisdiction, all Tribal remedies were exhausted (Pet. App. 34). This agreed with the holding in *Kishell v. Turtle Mountain Housing Authority,* 816 F.2d 1273, 1276 (8th Cir. 1987). The Ninth Circuit affirmed the District Court by concluding that the parties had exhausted their tribal remedies and added that "the parties have been afforded more than due process in both tribal and federal court." (Pet. App. 5)

The United States District Court recognized the Minnesota Panel decision on grounds of comity.[10] (Pet. App. 5) The concept of comity for Tribal Court decisions is well accepted by Federal Courts.[11] In further support of the District Court's decision, the Ninth Circuit added that recognizing the decision of the Minnesota Panel was appropriate because to

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[10] "Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard . . . to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). "As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002).

[11] *LECG, LLC v. Seneca Nation of Indians,* 518 F.Supp.2d 274 (U.S.D.C. Fed. 2007); *Kerr-McGee Corp. v. Farley,* 115 F.3d 1498 (10th Cir. 1998); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001).

recognize any other decision offered by the Bills group "is inconsistent with the parties' contractual choice of forum." (Pet. App. 5)

Exhaustion of Tribal remedies and extending comity to a Tribal Court decision were the only two issues brought before the United States District Court. Likewise, these were the issues argued before the Ninth Circuit Court of Appeals. Both issues were addressed by both courts. The issues are resolved, concluded, and decided correctly and this Petition for Writ of Certiorari should be denied.

III. CONCLUSION

The Petition for Certiorari should be denied because it raises issues not preserved in the United States District Court and the Ninth Circuit Court below. The Petition should be denied because, after waiting patiently for an elongated Tribal Court process, the United States District Court and the Ninth Circuit were convinced that the Tribal processes had been exhausted and only then, did both Courts follow the accepted federal law of comity in recognizing the decision of the Specially Appointed Court

of Appeals of the Winnemucca Indian Colony, the Minnesota Panel.

Respectfully submitted,

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Counsel for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Thomas Wasson, et al.,

Plaintiff,

-vs-

Inter-Tribal Court of Appeals of Nevada; et al.,

Defendants. /

NO. CV-N-04-573-HDM(VPC)
United States District Court
400 S. Virginia Street
Reno, Nevada 89501
December 10, 2004

TRANSCRIPT OF PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION (#4)

BEFORE THE
HONORABLE HOWARD D. McKIBBEN
UNITED STATES DISTRICT JUDGE

(Filed Jan. 11, 2005)

APPEARANCES:

FOR THE PLAINTIFF: Robert R. Hager
Treva Hearne
Attorneys at Law

FOR THE DEFENDANT: William Kockenmeister
Attorney at Law

Proceedings recorded by mechanical stenography produced by computer-aided transcript

OFFICIAL COURT
REPORTER: KATHRYN M. FRENCH, RPR
NEVADA LICENSE NO. 392
CALIFORNIA LICENSE NO. 8536

[2] Reno, Nevada, Friday, December 10, 2004, 9:00 a.m.

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THE CLERK: Case number CV-N-04-573-HDM(VPC), Thomas Wasson, et al. versus Inter-Tribal Court of Appeals of Nevada, at al.

Robert Hager and Treva Hearne are present on behalf of plaintiffs. William Kockenmeister is present on behalf of the defendants.

THE COURT: Okay. Thank you, Miss Clerk.

This is the time set for the hearing on the motion for preliminary injunction. I've he reviewed the pleadings that have been filed here.

Counsel, are you ready to proceed?

MR. HAGER: Ready on behalf of the plaintiffs, Your Honor.

MR. KOCKENMEISTER: Ready on behalf of the defendants, Your Honor.

THE COURT: All right. Thank you. You may go ahead.

MR. HAGER: Good morning, Your Honor.

Your Honor, the first issue in this case today is whether the ITCA has any jurisdiction. Jurisdiction cannot be waived. It either exists or it doesn't exist.

The ITCA provides for appellate review for Nevada tribes, quote:

"Which by resolution of the respective Tribal [3] Councils or the Tribal Law and Order Code, designate appeals to held by the Nevada Inter-Tribal Court of Appeals," end quote.

That's what the basis for jurisdiction of the ITCN is, Your Honor.

THE COURT: Well, let me suggest that I don't think there's any question that the Inter-Tribal Court of Appeals has the right to review matters on appeal from a decision of a tribal judge. There are some things, and the reason I set this hearing – and maybe it would be easier if I just ask some questions because I need to try to get some history on this. I'm well aware of a lot of problems that have arisen in the context of this dispute going back to 2000 in connection with other litigation that we've have, and it's very unfortunate, and I've attempted to have other matters resolved.

What was the basis on which matters were submitted to what I'll call the Minnesota Panel? Was it a stipulation?

MR. HAGER: Yes, Your Honor.

THE COURT: All right. Signed by whom?

MR. HAGER: Signed by, I believe, all sides; all parties to the disputes in Winnemucca.

THE COURT: And was that in written form?

MR. HAGER: I believe the stipulation was in written form. There was no dispute with regards to the establishment [4] of that special panel.

THE COURT: And what did the stipulation say with respect to whether or not the parties would be bound by that decision?

MR. HAGER: Well, there's a dispute in that regard as well, Your Honor. I know –

THE COURT: Putting aside the dispute, what did the language say? I haven't seen it. I'd like to see the document. Is there a specific document that was signed by all the parties?

MR. HAGER: Let me see if I can answer that question.

THE COURT: If you have that, I would like to take a look at it.

MR. HAGER: Your Honor, we do have it at the office, but I don't have it here today.

THE COURT: Okay. Well, can you give me your best recollection of what it says about whether the parties agree to be bound by that decision.

MR. HAGER: It is our position that it does provide that the parties agree to be bound by that decision. There is –

THE COURT: What's the language, to the best of your knowledge?

Okay. I'm kind of back on the circular thing, I [5] guess, but, you know, I am concerned about that.

Now, that panel was created by the Ninth Circuit arbitrator, isn't that true?

MR. HAGER: Well, there is a subsequent decision by the Ninth Circuit directing that the – any appeal from that panel should go to the Interior Board of – and let me state –

THE COURT: What appeal? What decision is that? I haven't seen it. Was that cited in the briefs?

MR. HAGER: I don't believe it was.

THE COURT: I would like to know what that decision is. What is it?

MR. HAGER: There is an appeal pending right now before the Interior Board of –

THE COURT: Okay. This is – this is all interesting. Now, can somebody give me the citation on that?

MR. HAGER: On the Ninth Circuit decision, Your Honor?

THE COURT: Yes.

MR. HAGER: I think I can give you the name of the case.

THE COURT: Okay. Let's start with that.

Counsel, could you come up here? If you want to kind of assist on some of this, we'll save some time. You may know some of the background here that will be helpful.

[6] MS. HEARNE: Yes. Excuse me, Your Honor. Treva Hearne on behalf of –

THE COURT: Yes.

MS. HEARNE: Your Honor, the history of this litigation was that when we first appealed the rejection of a temporary restraining order to put the assets in trust –

THE COURT: Yes.

MS. HEARNE: – we were before a Ninth Circuit Court of Appeals mediation service, and they asked if we could agree to an appeal. We then wrote a very summary sort of fashioned agreement, which Mr. Pope wrote. And what he claims is, well, I didn't say that that would be the final appeal. Well, there is no appeal beyond the – if it were –

THE COURT: Let's not get into a whole lot of the nuances of it.

MS. HEARNE: Right.

THE COURT: There was a draft and it was signed, who signed it?

MS. HEARNE: I signed it on behalf of the Winnemucca Indian Colony. Mr. Pope signed it on behalf of –

THE COURT: The parties didn't sign it, but each of you signed it on behalf of your respective clients?

MS. HEARNE: That's correct, Your Honor.

THE COURT: All right. And then was there an order entered by anybody pursuant to that stipulation?

[7] MS. HEARNE: No. What there was was a dismissal of the actions before the Ninth Circuit, based upon our entering into that stipulation.

THE COURT: Okay. And then the panel was convened and who paid for the panel?

MS. HEARNE: The Winnemucca Indian Colony account, which is now held by the federal court and Valerie Cooke, magistrate.

THE COURT: And that's where that money came from, correct?

MS. HEARNE: That's correct, Your Honor. And it was held in the courtroom of Valerie Cooke.

THE COURT: And there was a written agreement, since it was signed, and what did it say about being bound? What was the language to the best of your recollection?

MS. HEARNE: It said there would be an appeal, and that that appeal would be before these justices, and that they would hear it, and there would be an order issued.

THE COURT: That was because the Bureau of Indian Affairs hadn't funded a –

MS. HEARNE: Inter-Tribal court.

THE COURT: – and Inter-Tribal Appellate Court, is that right?

MS. HEARNE: That's correct.

THE COURT: Okay. And was there any language in [8] there that said that the parties agree to be bound by that decision?

MS. HEARNE: There was no language that said that exact word.

THE COURT: Okay. Now, as I understand what has just been said, Mr. Hager was telling me a minute ago that there was a provision someplace that indicated that that decision was subject to review by someone in the BIA.

Is that right; or did I miss understand?

MS. HEARNE: That was just a misunderstanding because there are two or three lines of litigation in this case.

THE COURT: I'm amazed there aren't more.

MS. HEARNE: Once the Ninth Circuit Court of Appeals turned back that appeal and said you must exhaust your administrative remedies –

THE COURT: Right.

MS. HEARNE: – the thing that's being appealed through Interior Board of Indian Appeals is whether or not the BIA must recognize a council of a federally recognized tribe. And in addition to, I have asked that the Winnemucca Indian Colony Council, Thomas Wasson, be recognized, because of the historic membership before them, and they have all the records. That still has not been determined.

And the Special Panel's decision made the same [9] conclusion, and that was because of the historic records, that Thomas Wasson, and all the people who were the council as of the date that Glen Wasson was murdered, should be reinstated.

THE COURT: Now, the decision –

MS. HEARNE: That's all that's before the Interior Board.

THE COURT: The decision I'm talking about, the Minnesota Panel, that came down August 16th, 2002.

MS. HEARNE: That's correct.

THE COURT: How long was it after that that the BIA suddenly came up with some money so that they could fund the Inter-Tribal Court of Appeals again?

MS. HEARNE: I believe they came up with money sometime in 2003.

THE COURT: Okay.

MS. HEARNE: They started, I think, about August of 2003.

THE COURT: So August – it was about a year later?

MS. HEARNE: They can answer that better than I can, they've got –

THE COURT: So, approximately a year later, you think they funded the Inter-Tribal Court of Appeals.

And I take it, during that period of time, until the Inter-Tribal Court of Appeals came into existence, and then there was this appeal up through the process there, what, [10] if anything, was done to comply with the provisions of this order entered by this Minnesota Panel?

MS. HEARNE: Well, certainly that was a dispute, Your Honor, but we asked the Bureau of Indian affairs to please allow us to re-enter their lands. And they refused to do that.

THE COURT: So, really, nothing happened.

MS. HEARNE: Other than we went ahead with membership. We went ahead doing everything else the Court instructed us to do.

THE COURT: That you could do.

MS. HEARNE: That we could do.

THE COURT: Right. But was there any – obviously there was no election held?

MS. HEARNE: Yes, we had –

THE COURT: There was an election held?

MS. HEARNE: Absolutely. We've held election –

THE COURT: It says October of 2002 election of WIC shall occur within six months of October 2002.

MS. HEARNE: And we did do that, and we held one in October of 2004, Your Honor.

THE COURT: All right. And what was the appellate route for challenging enrollment issues?

MS. HEARNE: Enrollment issues, once determined by Tribal council, once it's recognized –

[11] THE COURT: Yeah.

MS. HEARNE: – would be – could be appealed to the Inter-Tribal Court if –

THE COURT: If there was no Inter-Tribal Court. That's my point.

MS. HEARNE: Right.

THE COURT: Isn't that true?

MS. HEARNE: At that –

THE COURT: So I don't see how there could have been due process for an appeal. And that's my concern here.

MS. HEARNE: Prior to 2000 there was, Your Honor.

THE COURT: I'm not concerned about 2000. I'm talking about the so-called 2002 election that was ordered by the Minnesota Panel.

MS. HEARNE: Right.

THE COURT: There was no mechanism in place – Well, let's backup.

It seemed to me a critical concern was the enrollment issue; who has the right to vote? That's been the basis of a lot of this dispute all along. And, who has the right to vote, who has the right to be enrolled is an issue that ultimately should be determined by the tribal court. The council that can make some certifications, but the tribal court has the right to review it, in my opinion.

The Inter-Tribal Appellate Court, if it exists, [12] has the right to review that. And, ultimately, at least due process issues can come to this court. That's my opinion. You may agree or disagree, but that's the way I see the posture of things. And that hasn't happened, and that's what's of concern to me.

Now, whether or not we rely on what happened in this Minnesota Panel, or we rely on what is being

said here by the Inter-Tribal Court of Appeals, it seems to me that the process that should be in place is to allow, if they're the warring factions or whatever here, to present lists, and to that extent, I'm inclined to agree with what has been done here, subject to appellate review as to the legitimacy of the people that are claiming entitlement to be enrolled and to vote, have that be reviewed, have their right of due process, and then this court could do two things:

One, if it's appealed here, one would be to determine whether or not those people had due process. That is, did they have the right to a fair hearing, notice and a fair hearing with respect to whether or not they were properly enrolled; and

Two, did the Inter-Tribal court act beyond its jurisdictions in making those determinations? In other words, was there something fatally flawed about the whole process?

So that's why whether or not we're dealing with what was done by the Minnesota Panel, or if we deal with [13] what's been done by this Inter-Tribal Court, that's the fair way fox. this matter, ultimately, to be resolved in my mind.

Now, tell me why you don't agree, if you don't.

MR. HAGER: Your Honor, the issue of membership is a fundamental issue which is solely within the control of the tribe. And that determination is to be made by the council pursuant to the constitution and the by-laws of the Winnemucca Indian Colony.

THE COURT: Well, they can designate the basis for enrollment, but whether or not somebody under those conditions, under whatever their constitutional provisions are, the Tribal Court and the Appellate Tribal Court have the right to review that, in my opinion.

MR. HAGER: And that's the process we're asking to have applied here; that the council makes the determination first. That's solely within their power –

THE COURT: Well, see, we have a problem here because who is the council?

MR. HAGER: Well, everybody agrees who the council is, even the Inter-Tribal Court of Appeals agrees who the council is. It's the council that was designated by the special. Minnesota Panel.

The problem is where they go from there. They then say there's no way to dispute that that is the council. But, we're doing to make a decision on who is the enrolled members.

[14] Well, that doesn't follow, Your Honor. That's what –

THE COURT: See, that's not exactly what I understood, because I understood that the Minnesota Panel indicated these people are the panel, which would be the – or the council, and those are the ones that are designated as plaintiffs in this action in this court, correct?

MR. HAGER: That's correct.

THE COURT: It was my understanding that the decision out of the Inter-Tribal Appellate Court was that you go back to 2000 and that would be the council, is that true?

MR. HAGER: That's what we're saying. We'll go back to that council. All of the remaining available members of that council are plaintiffs in this case, Your Honor.

THE COURT: Are both parties telling me that they've agreed on who the council is?

MR. HAGER: That's not in dispute, Your Honor. Exactly.

THE COURT: Okay. Who are they?

MR. HAGER: And it's set forth – it's Tommy Wasson – Thomas Wasson. I'm sorry.

THE COURT: Right.

MR. HAGER: Sharon Wasson.

THE COURT: Right.

[15] MR. HAGER: Bills, who is unavailable. He's disappeared.

THE COURT: Well, yes. I mean, it looks like there's a vacancy there.

MR. HAGER: And Elvirene Castro.

THE COURT: Elvirene Castro and Bills.

Who is Lucy Wasson Lowery?

MR. HAGER: She's deceased, Your Honor.

THE COURT: All right. I mean, she's listed in the decision by the Inter-Tribal Court. So she was originally in that action, is that right?

MR. HAGER: Yes, Your Honor. She's deceased now.

THE COURT: Okay. Well, tell me what the issue is here then.

MR. HAGER: So then the problem, Your Honor, is I agree with your analysis here that the council has the power to make that determination. And there's appellate review of that decision in terms of who is an enrolled member.

The defendants here agree who that council is. The special Minnesota Panel determined who that council is.

THE COURT: Right.

MR. HAGER: The problem is in this court, this BIA court then goes off in the direction of saying, well, but we're going to decide who the members are. And that doesn't follow, Your Honor. That's what the problem is.

[16] THE COURT: That's not really the way I read that decision. What that decision is saying is these people will submit the list of the people that

they believe are enrolled, and anyone that they agree on will be enrolled. And anywhere there's a dispute, will be subject to review. And I don't think there's anything wrong with that, because they would review it – and I think an Inter-Tribal Appellate Court has the right, whether it's a special Minnesota court or if it's the Inter-Tribal Court, has the right to review that determination, you know, on due process grounds and give them the right of a hearing, an opportunity to be heard, and notice of that hearing, in connection with anybody that claims they should have been on that list and they were excluded from that list.

That's all I read this decision to say. Why am I mistaken on that?

MR. HAGER: The reason you're mistaken, Your Honor, is that the council has the right to determine membership. They make that determination. Then, if someone wants to complain about that, they appeal. The appellate court doesn't make that initial determination, and the standard on appeal is abuse of discretion. They don't exercise the initial decisions on whatever standard they want to apply in terms of who is or is not a member at this point.

THE COURT: I thought that's what they were saying [17] in effect, is that the council gives us a certified list, and the only reason they say there's a dispute is because there's two councils here.

MR. HAGER: If they say, and what they're going to propose here today is that the council is going to make a determination with regard to who

the enrolled members are, and then anybody who wants to appeal that under the law that applies to that kind of determination, Your Honor, then that's fine.

THE COURT: Well, that's what should be done.

MR. HAGER: But that's not what the existing order is. The existing order is there's so much confusion and chaos there, that we're going to make that decision. They can't make a decision unless there's an appeal.

THE COURT: Let me shift over to opposing council. Do you agree on who the council is?

MR. KOCKENMEISTER: That's the question, Your Honor. There is no one out there, there is no body, there is no court, the BIA, no one has indicated or recognized what the appropriate council is. And that's what we're faced with, Your Honor. We're faced with –

THE COURT: But do you agree on who the council should be?

MR. KOCKENMEISTER: We don't. It's unclear that –

THE COURT: Well, Mr. Hager just got done saying the [18] two of you agreed on this.

MR. KOCKENMEISTER: I don't know, Your Honor, if I may, I don't know where he came up with that conclusion.

What we have suggested is that there is no legitimate council that's recognized by any body out there. There are two competing factions. They've each held their own elections, Your Honor. It's chaos. And what we're suggesting is that the first step is to determine who the appropriate enrolled legitimate members of the Winnemucca Indian Colony are. We have asked both sides to submit a list. We'll go through it and we'll make the determination as to who the legitimate members of the Winnemucca Indian Colony. After that –

THE COURT: When you say "both sides," you mean the two –

MR. KOCKENMEISTER: There are competing factions out there.

THE COURT: Now, just a second. You're talking about what you perceive to be two councils?

MR. KOCKENMEISTER: Well, they are alleging that there are two councils. We haven't made any determination as to who the appropriate council is, Your Honor. All we're saying is it came before us, we had two competing factions that are both are alleging – both held elections and both are alleging they are the legitimate council.

[19] Now, the plaintiffs in this case are relying on the Minnesota decision to assert that they are the legitimate council. If you read our decision closely, what we have stated is that we cannot determine

at this point in time who the legitimate council, who the le –

THE COURT: Let me ask this.

Since the parties agree to have the Minnesota council decide this issue, and that was agreed upon, right? I mean that was agreed?

MR. KOCKENMEISTER: It was agreed as –

THE COURT: And you don't waste the Ninth Circuit's time. And you're certainly not going to waste this Court's time.

MR. KOCKENMEISTER: And the issue that we had with that decision was we didn't see in the agreement that that was a binding final decision.

THE COURT: Well, put that aside for a second.

You agree that it was submitted for decision by that body?

MR. KOCKENMEISTER: It was submitted. That is correct.

THE COURT: All right. And that body made a decision. I, for the life of me, can't understand why the parties don't go on then and let that council designate who the enrolled members are. And then, to the extent [20] anybody has been excluded from that list, they have the right of appellate review to determine, based upon due process considerations, notice,

opportunity for a hearing, why they shouldn't be included. And then if they're successful on that, they're included, an election is held a short time thereafter, and whatever the results of that election are, when they're certified, that's it and everybody moves on with their life.

MR. KOCKENMEISTER: And that is very close to what we're suggesting.

THE COURT: What's the difference?

MR. KOCKENMEISTER: The difference is that –

THE COURT: You want to submit two lists?

MR. KOCKENMEISTER: – the Minnesota Panel was acting in place of the Inter-tribal Council Court of Appeals because it didn't exist –

THE COURT: What can you do – Right. I mean, what can you do?

MR. KOCKENMEISTER: Because it didn't exist –

THE COURT: That's basic fairness.

MR. KOCKENMEISTER: But, now, we still – they did not, for whatever reason, Your Honor, that decision did not resolve the dispute. For whatever reason, it didn't work. No one is recognizing any council at this point in time.

THE COURT: You see when that finally happens, [21] whether the Court wants to or not, out of necessity, it has to intervene.

MR. KOCKENMEISTER: That's our position, is that we're faced with –

THE COURT: I think the way they should intervene is to accept what the court in existence at the time said. And that is, here's your council. Go ahead and submit a list. You can conduct the election. But, before you conduct the election, anyone that wants to appeal to be included as a potential voter here, has the right to do that. And enough time should be allowed so they can do that before the election.

Now, that's basic fairness. What's wrong with that?

MR. KOCKENMEISTER: There's nothing wrong with it, but what we're suggesting is – we wanted to end this controversy as quickly as we possibly could and argue –

THE COURT: Why don't you all consent to let me end this as soon as possible then. I would be delighted to do that. I don't want to intervene. You know, this should all be resolved within the tribe, and it should all be resolved by the Inter-Tribal Appellate Court.

MR. KOCKENMEISTER: That's our position, is we would like to resolve that matter so that we can establish legitimate – if we went back, and if

you took the position that the Minnesota Panel was the appropriate decision, and [22] that's the council, then it would be back to us again because the dispute wouldn't end because the other faction –

THE COURT: Well, it would end because the other faction if they claim they're being left out, all they have to do is the people that they claim have not been entitled to be enrolled are not being enrolled, all they have to do is have those people, collectively, file with the Inter-Tribal Appellate Court or with tribal court, subject to appellate review, and there would have to be a built-in time frame for that, to have the matter heard so that they could be certified or not certified.

MR. KOCKENMEISTER: And that's exactly –

THE COURT: First what she should do is go to the council that's been designated by the Minnesota court, they should go to them. If they're refused, then they should have a reasonable period of time in which to take an appeal on that. And then if they're denied that, I think the only appellate review from that to this court would be on whether or not they were denied due process. I don't get involved in the other parts of it probably. I'm not sure. I would have to look at that.

But, what's not eminently fair about that?

MR. KOCKENMEISTER: It's not that it's not fair. We believe our solution is – it's going to get to

us, in our opinion, no matter – if the Tribal Council is as set forth by [23] the Minnesota Panel – and by the way, I'm not sure if the entire members are still around as Mr. Hager said, so you have a partial council that decides membership. We know that there's going to be a dispute. It's going to work its way through the system. Several years from now, we'll have the same issue before us.

THE COURT: How many people are we talking about?

MR. KOCKENMEISTER: I believe it's about – is it a 100 people in the colony?

MR. HAGER: Your Honor, the last list that was submitted in 1990 – and there's a long history of membership here and self-government successfully by this council –

THE COURT: How many people are we talking about?

MR. HAGER: We're talking about 99 on that list, Your Honor.

THE COURT: Ninety-nine people? Okay.

Ninety-nine people. And of the 99 people, how many – I realize I'm not binding anybody to this, how many do you pretty much concede are enrolled members and there's really no dispute over it, of the 99? Just give me a figure.

MR. HAGER: No dispute? Sixty, Your Honor.

THE COURT: So the dispute is over 39 people, right, approximately?

MR. HAGER: That's approximately correct.

THE COURT: Okay.

[24] MR. KOCKENMEISTER: And I would like to add, Your Honor, we had a –

THE COURT: Okay. Couldn't that be resolved fairly simply? We're not talking about thousands and thousands. If they can decide a national election –

MR. KOCKENMEISTER: You're absolutely right. That's our position, Your Honor. We have those lists. We've asked the parties to submit the lists. We've submitted – we have a list of the disputed individuals. Now all we would like to do is now hold a hearing on those disputed individuals and make a determination as to whether they're legitimate members of the Winnemucca Indian Colony and hold the election. We think that's the quickest and fairest way of resolving this dispute.

Under the use of the Minnesota –

THE COURT: Why don't you simply stipulate that the council that was established by the Minnesota Panel – and you could do this before the Inter-Tribal Court, rather than having this court take some type of extraordinary action, which I'm not inclined to do – simply stipulate that for purposes of getting this matter before the court, moving it

forward, that that council would be the council that would make the initial determination with respect to those who are enrolled members and entitled to vote.

The parties would further stipulate that to the extent there are any that are not included on that list who [25] wish to vote, believe they should be enrolled members, their names would be certified for immediate appellate review to the Court of Appeals, the Inter-Tribal Court of Appeals, with an opportunity for a hearing and a decision as to whether or not they should be enrolled members to vote. And that that process should be completed within, say, 30 days or 60 days.

MR. KOCKENMEISTER: Your Honor, I think, essentially, we've already done that because they've submitted a list based on what they believe are the appropriate members. The other side has submitted a list where they believe these individuals should be included as members.

THE COURT: That's where you're down to the 39 that are in dispute?

MR. KOCKENMEISTER: Right. We have that information already. All we now want –

THE COURT: Counsel, do you agree with that or not?

MS. HEARNE: (Shakes head negatively.)

THE COURT: You said you thought there were 39 in dispute. He thinks there's 39 in dispute.

Why can't everybody move forward to let – if you need a certification from this original council, fine, certify it, and then that would be the trigger for the Inter-Tribal Court of Appeals to give an opportunity for a hearing to these 39 that claim they've been disenfranchised.

[26] MS. HEARNE: I believe it's because some people who want to be members who are not on that list, who would have the right then to file their application for membership with the council, and those people are the ones who have never been members who want to file an application.

THE COURT: That's fine. Let them file it. Let them file it and let the court review that.

MR. KOCKENMEISTER: We have no problem. We just want –

THE COURT: So let's do it. Why can't it –

MS. HEARNE: It has to be filed with the council so they can re –

MR. HAGER: So long as it's filed with the council, Your Honor. The council makes the determination that –

THE COURT: Fine. I'm saying stipulate so it can be filed with the council. This council is not going to do anything other than just probably rubber-stamp whatever they want to rubber-stamp, but then you get it into the court. That's all I'm trying to do.

Why can't you stipulate to do that? Go back to the Inter-Tribal Court, indicate the parties – because you can stipulate to what you want – that the parties have stipulated that the council that was designated – the parties agree that the council that was designated through this hard work of this Minnesota Panel, will make the initial [27] certification of those who are the enrolled members, and any of the group that you're talking about who feel they should be. And that the ones that are, that the council – and the council is probably going to at least confirm those that you all agree on. There will be that one list. The second list will be those that are not agreed, and they won't certify those.

And then there would be a period of time, I would think something in the neighborhood of 30 days or whatever would be a reasonable period of time for you to stipulate, that they would have the right, those who claim they're disenfranchised, or claim they should be enrolled and are not, would have the right to file an appeal with the Inter-Tribal Court of appeals, and with appropriate notice and an opportunity to be heard, the decision would be made by the Inter-Tribal Court of Appeals as to whether or not they're entitled to vote and be enrolled. Then at that point, that decision, I suppose, could be appealed to this court.

Now, I'm not going to give you an advisory opinion now on what the breadth of my authority would be, whether it's simply to determine whether due process has been met here, or whether or not I have

the right to go in and make a determination as to who should be enrolled and who's not. I'm not sure at that one. I haven't looked at the law in the area.

[28] But in any event, after that process, after that appellate period has expired, then there would be a definite date set for election, and those who are enrolled pursuant to law would be entitled to vote, period. They'll vote. Whoever they vote on, that's the council and you can move on.

What's wrong that?

MR. HAGER: That sounds good. If I could have one moment, Your Honor.

THE COURT: Do you see a problem with that?

MR. KOCKENMEISTER: I don't see a problem. The only issue is that we've interjected another step in the process because we already know who –

THE COURT: But if that makes everybody happy, why not do it?

MR. KOCKENMEISTER: I'm okay with it. All I'm saying is –

THE COURT: It's not a step that's going to hurt anybody.

MR. KOCKENMEISTER: – we know who the disputed individuals are already.

THE COURT: That gives a little support, anyway, to the hard work these people in Minnesota did. I'm impressed with all the work they put in on this. And it cost – I don't know how much that cost, but I'll bet it was twenty, thirty, forty thousand dollars.

[29] MR. KOCKENMEISTER: It's a significant amount of money, Your Honor.

MS. HEARNE: Thirty-four thousand dollars.

THE COURT: That was my recollection that it was in the thirty thousand dollar range. That's not the barometer on which we decide whether a decision is a good one or not, but certainly everybody had agreed to do that. It's time to move on. We make agreements. We're bound by them. And we move on.

MR. KOCKENMEISTER: We don't have a problem. We just believe it's our responsibility to ultimately determine disputes over tribal membership. And I think it's clear that it's our responsibility.

THE COURT: What's your problem with that resolution?

MR. HAGER: I don't have a problem with that resolution. In response to what was just said, there is no dispute right now regarding membership, because membership has not yet been determined. So once the membership is determined, then I think the comments here might be appropriate. But, it's inappropriate to anticipate there's going to be a dispute,

and since there may be one in the future, we'll just take control of that decision now. That's the problem we have with the decision.

MR. KOCKENMEISTER: Your Honor, I beg to differ with [30] that. There is –

THE COURT: Well, could I have you go back then to the Inter-Tribal Court of Appeals and request that they re-open the matter and allow you, on your stipulation, to proceed as I've just outlined it for you? Would you be willing to do that?

MR. HAGER: Yes, we would, Your Honor.

THE COURT: Would you be willing to do that?

MR. KOCKENMEISTER: We have no problem. If they would be stipulating with the other, quote, competing faction in this matter, we don't have a problem with that. We just -if I hear the Court correctly, you believe it's our responsibility to determine disputes with respect to tribal enrollment. And we agree wholeheartedly. And if this is the procedure –

THE COURT: What I've said is this: That it's my opinion, if you look at the Articles, if you look at the Constitution, that it's the responsibility first of the council to make that determination. Unfortunately, there's a huge question about that as to who is the real council.

It's my opinion that the Minnesota Panel did a fine job in trying to resolve that, but it didn't get resolved. So, I'm saying the first opportunity should be given, on the certification question to try to comport with what the [31] constitution says, to let that council; that is, the council that was denominated here, absent William Bills, who isn't around –

MR. KOCKENMEISTER: And a deceased person as well.

THE COURT: And a deceased person. So at least you have a body doing something that's consistent with the Constitution there, they'll make the certification. There will also be this list of people, either those who are enrolled that claim they've been disenfranchised, or those who want to be enrolled –

MR. KOCKENMEISTER: To be enrolled, right.

THE COURT: – that list would be made available, and that they would, and they could do it collectively, have the right to take an appeal, with an opportunity for notice and hearing then before the Inter-Tribal Court of Appeals for a determination as to whether or not they should be permitted to be enrolled and, therefore, to vote.

That's what I'm suggesting.

MR. KOCKENMEISTER: And –

THE COURT: That would be the process. And the time frame you can work out in your stipulation so that it's reasonable.

MR. KOCKENMEISTER: And –

THE COURT: And I would think the Court of Appeals would go along with that.

[32] MR. KOCKENMEISTER: We would. And to make the process simple, perhaps if there's a recognition that we would retain jurisdiction over this matter until the process as you've described is worked out, that would be our suggestion, rather than –

THE COURT: Well, I think you have jurisdiction over it, so I think you would retain jurisdiction over it. I think this court has the right to review what you do, but probably on a fairly limited basis. I don't want to intrude on what the council does, and I don't want to intrude on what your court does because those are things that should be left to the tribe. They should be left to the colonies. They should be left to the business of the Winnemucca Indian colony, in my opinion.

The Federal District Court does not want to get involved in these matters except as a last resort. So, I don't want to precipitously move in and tell everybody how they have to do things. But, everybody out there is entitled to have a fair election. And the fairest kind of election I can think of is where everybody has a right to vote that has the right to be enrolled, and they should have an opportunity and a hearing

ultimately, since there's, you know, it's questionable about the council, ultimately before the Inter-Tribal Court of Appeals.

MR. KOCKENMEISTER: Your Honor, we agree with that.

[33] Our concern in coming here today as defendants, was the assertion, we thought by the plaintiffs, that we didn't have jurisdiction at all to decide enrollment membership. And that gets to the heart of –

THE COURT: Well, my understanding of what they were contending is that the council should have the right to say first who the parties are. And I think they're right on that. That's the way I read everything here.

MR. KOCKENMEISTER: I won't – ultimately, it's going to get to our court, I feel. And as long as we have the right to review those decisions, I'm comfortable with the stipulation that you suggested that the parties enter into, Your Honor.

THE COURT: Should we just continue – what I'm going to do is deny the application for preliminary injunction without prejudice. The parties understand they can come back in here, you know, on appropriate notice, and I'll try to get an expedited hearing on it if we need to.

I'm going to allow you to go ahead then and work out the stipulation. You can get a copy of the transcript if you want to do that. I think it's fairly clear what we're talking about here.

So, the process simply would be that you agree that those parties who are still alive that constitute the board that was designated by the Minnesota Panel, should [34] first review all of these matters of people who claim they're entitled to vote and be enrolled; either the ones who are outside and want to be in, or those who are in and claim they aren't – that they're being disenfranchised. And then there should be a certification as to those that the council believes should be entitled to vote, they're enrolled.

And then as to the balance of them, they should collectively have the right to take an appeal to the Inter-Tribal Court of Appeals, and have appropriate notice, an opportunity for a hearing to present the issues that they have to present, and then that Inter-Tribal Court of Appeals would make the decision as to whether or not they're entitled to vote.

Then if somebody maintains that they've not been given due process, and that they therefore have some right to appeal to this court, I'm going to leave this action open for purposes of allowing them to come in on that basis. And if that delays the election, it will delay it. Otherwise, the Inter-Tribal Court of Appeals then, once that decision is made, then I think that council can go ahead and set the date for the new election.

And I don't think the court should be setting dates for elections and everything else. I think that ought to be up to a council. But, I agree with you that there should be that mechanism available so that the

council doesn't stonewall [35] anyone from have the right of having the matter heard by the Inter-Tribal Court of Appeal.

MR. HAGER: I don't disagree, Your Honor.

THE COURT: All right. Any question by either side?

MR. KOCKENMEISTER: Your Honor, I'd like to, if I may briefly, throughout the pleadings in this matter, the theme is that somehow the Inter-Tribal Court of Appeals is the pawn of the Bureau of Indian Affairs. We may be back –

THE COURT: Let me talk about that just for a minute.

You know, I complimented the Minnesota Panel for what they did and, frankly, in reading the decision and order on appeal from the Inter-Tribal Court of Appeals, it looked to me like they, in good faith, were doing a fine job of trying to resolve a very, very difficult problem.

MR. KOCKENMEISTER: And I think –

THE COURT: I'm well aware how difficult that problem is, Judge Cooke and I both, in connection with earlier proceedings here.

MR. KOCKENMEISTER: And I just want to state for the record, as an officer of this court, no one from the BIA contacted any of the three judges on this panel and suggested that we had to enter a decision in any way or form. We are totally independent.

And I just wanted to make sure that the integrity of the Inter-Tribal Court of appeals –

[36] THE COURT: Sure.

MR. KOCKENMEISTER: – is not maligned in this case.

THE COURT: Sure. Well, that's fine.

There is one thing that's very troubling to me about all of this. I can't, for the life of me, understand why there wouldn't be adequate funding out there to keep a court of appeals alive and well, so that it can decide these issues. And to the extent the BIA doesn't fund something like that, I think that's a travesty.

MR. KOCKENMEISTER: And, Your Honor, I don't disagree with you. I came – I'm the new wave, if you will. And I can tell you that the justices are committed to having a strong and independent appellate court. Obviously it does depend on funding from the BIA, which we don't have any control over.

THE COURT: Well, I know. And to the extent my words mean anything, they should always fund something like that. Everybody has the right to go into court. Everybody has the right to an appellate review. And everybody in the colony should have that right. And they should have as much of a right as anybody else in the United States to come into court and have their grievances resolved. And to the extent the BIA or anybody else disenfranchises somebody from not being able to go and do that – I mean, heaven help us if all the funding is cutoff from the

courts in this country so [37] people don't have some right to assert and protect their constitutional rights.

MR. HAGER: And we appreciate that, Your Honor.

THE COURT: All right. Thank you very much. I appreciate it. Thank you, counsel.

MR. HAGER: Thank you, Your Honor.

MS. HEARNE: Thank you, Your Honor.

THE COURT: We're in recess.

(Court Adjourned.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathryn French 1-10-05
KATHRYN M. FRENCH, RPR, CCR DATE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BANK OF AMERICA, N.A., a Delaware corporation, Plaintiff, vs. WILLIAM BILLS, ET AL., Defendants.	CV-N-00-0450-HDM (VPC) **REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE** February 13, 2003

This Report and Recommendation is made to the Honorable Howard D. McKibben, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants Thomas Magiera (deceased), Thomas Wasson, Elverine Castro and Andrea Davidson's (the "Wasson group") motion for summary judgment (#147). Defendants William Bills (an originally named defendant in this action), Allen Ambler, Charlene Dressler, Linda Ayer, Clorinda (Toni) George and Lovelle Brown (the "Bills group") opposed (#151). The Wasson group replied (#153). The parties have additionally filed supplemental points and authorities pursuant to this court's order of November 25, 2002 (#157) (Wasson group (#163); Bills group (#165)). The court has thoroughly reviewed the record and the parties' motions and supplemental briefs and finds that defendant Wasson group's motion for summary judgment (#147) should be dismissed without prejudice as premature.

I. BACKGROUND & PROCEDURAL HISTORY

Plaintiff, Bank of America, N.A. ("Bank of America"), filed this interpleader action based upon conflicting claims as to who has authority to use an account opened in the name of "Winnemucca Indian Colony" (#1). The dispute arises because two groups claim to be the rightful tribal council of the Winnemucca Indian Colony ("WIC"), both arguing they are entitled to use the bank account funds.

Bank of America filed its complaint in interpleader on August 28,2000 (#1). The Wasson group answered on October 10, 2000 (#13). The Bills group answered on December 18, 2000 (#23). Bank of America was dismissed on June 7, 2001, depositing the contested funds with the court (#82). Although this case has an extremely lengthy factual history, the following is a brief history of the facts relevant to this motion.

As of February 21, 2000, the members of the WIC tribal council were Chair Glenn Wasson, Vice Chair William Bills, and members Thomas Wasson, Elverine Castro, and Lucy Lowery (#147). Glenn Wasson was murdered on February 22, 2000. *Id.* Subsequently, the Colony Council split into two factions: (1) Vice Chair Bills claimed to be the acting chair of the tribal council; and (2) members Thomas Wasson, Elverine Castro, and Lucy Lowery claimed to be the majority of the tribal council. Each faction purports to be the official tribal council of the WIC and both groups have taken action on behalf of the colony. *Id.*

Each group has held separate elections which have not been recognized by the, other group. *Id.* Each group recognizes a different tribal judge on the tribal court. *Id.*

The tribal court case deciding who constitutes the tribal council was considered by the Inter-Tribal Court of Appeals of Nevada in February 2001 (#126). However, the appellate court remanded the case back to the tribal court because the case lacked a record for appeal. *Id.* The appellate court obtained an agreement from the parties that they would jointly appoint a mutually acceptable *pro tem* tribal court judge. *Id.* *Pro tem* Judge Steven Haberfeld was directed to answer three specific factual questions: (1) the names of the members of the Winnemucca Indian Colony who are eligible for enrollment; (2) the identity of the proper and legitimate members of the Winnemucca Colony Council; and (3) the identity of the Winnemucca Tribal Court judge. *Id.*

Judge Haberfeld held several days of hearings in 2001 and 2002 and rendered his decision on May 9, 2002. *Id.* Judge Haberfeld found that neither group was the legitimate Winnemucca Colony Council, and he ordered that a new tribal council election take place in October 2002. *Id.*

Each side subsequently appealed Judge Haberfeld's May 9, 2002 decision. Normally, such appeals would go back to the Inter-Tribal Court of Appeals for Nevada, which is under contract with the Bureau of Indian Affairs to provide an appellate court to tribes

in Nevada (#163). However, due to lack of funds, this court was dismantled sometime after the February 2001 appeal of the first tribal court decision. *Id.* Thus, there was no court to hear the appeal. *Id.* The parties took it upon themselves, with the help of the Ninth Circuit mediation program, to stipulate to a Court of Appeals consisting of a three-judge panel to hear the appeal. *Id.* The parties agreed on three judges from Minnesota, all with backgrounds in tribal law, to hear the appeal. *Id.* The stipulated Court of Appeals held oral arguments on July 24, 2002 (#147). The court rendered its decision on August 16, 2002, reversing Judge Haberfeld's May 9, 2002 opinion. *Id.* Specifically, in regards to the tribal council, the stipulated Court of Appeals found that the WIC tribal council consisted of Sharon Wasson, Thomas Wasson, William Bills, Elverine Castro, and a vacancy due to the death of Thomas Magiera. *Id.* Andrea Davidson was subsequently appointed to fill this vacancy. *Id.*

II. DISCUSSION

The Wasson group argues in their motion for summary judgment that the sole issue remaining in this case, the determination of which parties are entitled to the disbursement of the Bank of America funds, has now been decided by the stipulated Court of Appeals (#147). Based on the August 16, 2002 decision by the stipulated Court of Appeals, the Wasson group requests that the court grant summary judgment in favor of these parties and disburse the funds. *Id.*

The Bills group contends in their opposition to motion for summary judgment (#151) and supplemental brief (#165) that the tribal court process is not yet complete and summary judgment should therefore be denied. At the heart of this contention is the Bills group's argument that the stipulated Court of Appeals lacked subject matter jurisdiction to hear the case (#165). The Bills group further argues that the creation of this court was in violation of the WIC code and constitution. *Id.* The Bills group contends that it has further avenues of appeal within the tribal court process and that this court cannot grant summary judgment until the jurisdictional issue and the larger decision of who constitutes the tribal council has been decided with finality. *Id.*

The Wasson group replies that they entered into the stipulation for the Court of Appeals in good faith and with the intention that it would be the final avenue of appeal (#153, #163). The Wasson group argues that the doctrines of judicial estoppel and good faith mandate that the court recognize the agreement for the stipulated Court of Appeals. *Id.* The Wasson group alleges that the Bills group is acting in bad faith by challenging the subject matter jurisdiction of the stipulated Court of Appeals. *Id.*

The way in which this case had advanced procedurally has created disorder and confusion. The court finds that the facts regarding how the attorneys in this case have conducted themselves are disturbing, but will address this in a subsequent order. Despite the allegations of bad faith and the doctrine of judicial

estoppel, for the reasons stated below, the court must dismiss the Wasson Group's motion for summary judgment (#147) as premature.

A. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial responsibility of identifying the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986); *Zoslaw v. MCA Distr. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). For this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins. Co.*, 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

B. Tribal Self-Determination

1. Tribal Self-Government

The Supreme Court has "repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (*citing Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144, and n. 10 (1980); *Williams v.*

Lee, 358 U.S. 217, 220-221 (1959)). "Tribal courts play a vital role in tribal self-government." *Iowa Mut.*, 480 U.S. at 14.

The Ninth Circuit found that it is "deeply rooted" in Supreme Court precedent that federal courts must afford tribal courts deference "concerning activities occurring on reservation land." *U.S. v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992) (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Deference to tribal courts concerning intra-tribal affairs or internal matters is a fundamental tenet of federal jurisprudence. *Plainbull*, 957 F.2d at 727; *see also U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122, 1125 (D. Nev. 2001) (holding that a tribal election dispute was solely a matter of tribal law and the federal court had no jurisdiction to determine which group was the governing body of the tribe).

Other circuits addressing this issue have found similarly. *Wheeler v. United States*, 811 F.2d 549 (10th Cir. 1987) (the federal courts have stated that when a dispute is an intra-tribal matter, the federal government should not interfere); *Shenandoah v. United States Dept of the Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998) (holding that a federal court did not have jurisdiction to determine which member of the Oneida Tribe was the proper tribal representative, as the question involved purely intra-tribal law); *Rosebud Sioux Tribe of South Dakota v. Driving Hawk*, 534 F.2d 98, 100 (8th Cir 1976) (holding that federal courts cannot be used to supervise and decide issues that arise in tribal elections); *Kishell v. Turtle Mountain*

Housing Authority, 816 F.2d 1273 (8th Cir. 1987) (finding a purely internal tribal controversy was involved and the court lacked jurisdiction to hear it); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985) (holding that resolution of disputes involving questions of interpretation of the tribal constitution and tribal law was not within the District Court's jurisdiction).

Although this court has jurisdiction over the interpleader case, this court does not have jurisdiction to decide the dispute over who the members of the tribal council are. *U.S. Bancorp v. Ike*, 171 F. Supp.2d 1122, 1125 (D. Nev. 2001). Deciding the question of who constitutes the tribal government is solely a matter of tribal law. *Id.*; *Shenandoah*, 159 F.3d at 712-13; *Rosebud Sioux Tribe*, 534 F.2d at 100; *Boe v. Fort Belknap Indian Cmty. Of Fort Belknap Reservation*, 642 F.2d 276, 278 (9th Cir. 1981) (distinguishing a habeas remedy as a proper use of the federal court, from interference with tribal elections as an improper use).

2. Tribal Exhaustion Doctrine

The rule of tribal exhaustion requires that federal courts give precedence to tribal courts by affording them a full and fair opportunity to determine the extent of their own jurisdiction over a claim. *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845 (1985); *Iowa Mut.*, 480 U.S. 9. The general principle is easily stated: "Parties who challenge, under federal law, the

jurisdiction of a tribal court to entertain a cause of action must first present their claim to the tribal court before seeking to defeat tribal jurisdiction in any collateral or parallel federal court proceeding. *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 65 (2nd Cir. 1997). The rule of tribal exhaustion is not jurisdictional, but rather is a "prudential" rule, pursuant to which a federal court, in view of comity considerations, "should stay its hand 'until after the tribal Court has had a full opportunity to determine its own jurisdiction.'" *Strate v. A-I Contractors*, 520 U.S. 438, 449 (1997) (*quoting National Farmers*, 471 U.S. at 857). While this rule does not present a jurisdictional bar, the court has discretion to raise the issue of comity *sua sponte*. *United States of America v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996).

Although this doctrine is "subject to a number of exceptions, tribal courts ordinarily have the first opportunity to determine the extent of their own jurisdiction." *AT&T v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002). These exceptions, set out in *Nevada v. Hicks*, preclude tribal exhaustion: (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the action is patently violative of express jurisdictional prohibitions; or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (*citing National Farmers*, 471 U.S. 845).

In the Ninth Circuit, numerous cases have discussed the issue of tribal exhaustion. *Allstate Indem. Co. v. Stump*, 197 F.3d 1071, 1073 (9th Cir. 1999) (we begin with the general rule that a party may not sue in federal court to challenge tribal court jurisdiction until it has first exhausted its remedies in tribal court); *Burlington North Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991) ("under the Supreme Court's ruling in *National Farmers Union*, 'the federal court should *not even make a ruling on tribal court jurisdiction* . . . until tribal remedies are exhausted'"); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987). Other Circuits have also weighed in on these issues. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991 (8th Cir. 1999) (holding that a party must exhaust his or her tribal remedies before a federal court can consider the case); *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991) (holding that, as a matter of comity, federal courts should not entertain a challenge to the jurisdiction of a tribal court until tribal court remedies have been exhausted); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 65 (2nd Cir. 1997).

In *Basil Cook Enterprises*, the District Court dismissed a contractual dispute between tribal members and the tribe pending exhaustion of tribal remedies. *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 63 (2nd Cir. 1997). The plaintiff tribal members challenged the District Court's dismissal. *Id.* The plaintiffs argued that there were no tribal remedies to exhaust because the tribal court

was a nullity, since it had been created in contravention of the tribe's laws and constitution. *Id.* In affirming the District Court, the Second Circuit stated

> First, to hold that the St. Regis Mohawk Tribal Court is a nullity under the tribal constitution would require this court to construe tribal law. This we may not do. The Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law, *see Talton v. Mayes*, 163 U.S. 376, 385 (1896); *see also Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985); *R.J Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983), and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions, *see Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir. 1994). Federal courts, as a general matter, lack competence to decide matters of tribal law and for us to do so offends notions of comity underscored in *National Farmers*.

Id. at 65.

At a minimum, the exhaustion rule requires that tribal appellate courts have the opportunity to review determinations of the lower tribal courts. *Iowa Mut.*, 480 U.S. at 17. Once tribal remedies are exhausted, the federal district court has jurisdiction under either 28 U.S.C. § 1331 (federal question jurisdiction) or 28 U.S.C. § 1332 (diversity jurisdiction) to review the tribal court's finding of tribal jurisdiction. *Strate*, 520

U.S. at 451; *see also Tillett v. Lujan*, 931 F.2d 636, 641 (10th Cir. 1991).

As a general rule, federal courts must recognize and enforce tribal court decisions under principles of comity. *AT & T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (*citing Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997)). However, this is subject to two exceptions. In *Coeur D'Alene*, the court stated "two circumstances preclude recognition: when the tribal court either lacked jurisdiction or denied the losing party due process of law." *Coeur D'Alene Tribe*, 295 F.3d at 904. Additionally, once the federal court recognizes the tribal court decision

> [t]he federal courts may not readjudicate the questions- whether of federal, state or tribal law- already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other reason.

Id.

C. Subject Matter Jurisdiction

As a matter of federal law, subject matter jurisdiction cannot be waived, *Intercontinental Travel Marketing, Inc. v. F. D. I. C.*, 45 F.3d 1278, 1286 (9th Cir. 1994). Lack of subject matter jurisdiction may be raised at any time by any party. *In re Kieslich*, 258 F.3d 968, 970 (9th Cir. 2001). The doctrines of judicial estoppel and waiver do not apply to subject matter

jurisdiction determinations. *Intercontinental Travel*, 45 F.3d at 1286.

Although it seems patently unfair, a party who has invoked the jurisdiction of a federal court but who is unhappy with the result will be allowed to challenge the jurisdiction at a later stage of the proceedings. *American Fire & Cas, Co. v. Finn*, 341 U.S. 6 (1951); *Santos v. Alaska Bar Ass'n*, 618 F.2d 575 (9th Cir. 1980). The intentional failure to raise the jurisdiction questions at the beginning of the lawsuit is reprehensible, however, the remedy for this conduct would be disciplinary action by the court rather than assumption of subject matter jurisdiction. *Page v. Wright*, 116 F.2d 449, 455 (7th Cir. 1940) *certiorari dismissed*, 312 U.S. 710 (1941).

III. ANALYSIS

There are two issues involved in deciding how to resolve the motion for summary judgment pending before this court (#147). The first issue is which group constitutes the Winnemucca Indian Colony tribal council. As further explained below, this issue is not something that this court can decide due to federal case law and policy recognizing the extreme importance of tribal self-determination. The second issue is whether the stipulated Court of Appeals had jurisdiction to hear the appeal of Judge Haberfeld's May 9, 2002 tribal court decision. This court finds that the jurisdictional question is a genuine issue of material fact, and therefore, cannot grant summary judgment.

However, this court presently is not the correct forum to decide the jurisdictional question. As further explained below, under the doctrine of tribal exhaustion, this court must defer to the tribal court process before it may address the issue of whether the stipulated Court of Appeals had the jurisdiction to hear the appeal.[1]

A. Subject Matter Jurisdiction Over This Case

This court has retained jurisdiction over the interpleader case despite the fact the that plaintiff Bank of America has been dismissed and all of the remaining defendants in the case lack diversity of citizenship (#90). This court currently holds the Bank of America funds at issue (#82).

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[1] The court would like to note the issues it will not be addressing, despite the many arguments the parties have made to this court. First, this court will not resolve issues of the WIC membership list. Allegations of due process violations and illegal exclusion from the WIC are not within this court's jurisdiction under the law of the case (#90). Second, this court will not address which judge is the official tribal court judge. Third, this court will not resolve whether the many elections held by the different groups during this long process are legal under the WIC constitution. Finally, this court will not address whether the parties are or are not complying with the August 16, 2002 decision by the stipulated Court of Appeals. None of these issues is presently before the court under the law of this case (#90). All of these issues are matters of internal tribal law and this court cannot decide such conflicts, If the parties need redress for any of the above grievances, they must go to the tribal court for relief.

B. Tribal Self-Government

The sole issue in this case is which parties are entitled to the Bank of America funds. This case was limited to one issue by the District Court's minute order of August 2, 2001 (#97) and by this court's order of February 12, 2003 dismissing all cross-claims and counter-claims (#167). To resolve the interpleader case, this court must determine the issue of which parties have access to the Bank of America funds. The determination of who has access to the money is dependant upon a resolution of which group constitutes the legal WIC tribal council.

Thus, the first issue is whether this court may decide who constitutes the tribal council. Deference to tribal courts concerning intra-tribal affairs or internal matters is a fundamental tenet of federal jurisprudence. *Plainbull*, 957 F.2d at 727; *see also U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122, 1125 (D. Nev. 2001) (holding that a tribal election dispute was solely a matter of tribal law and the federal court had no jurisdiction to determine which group was the governing body of the tribe); *Wheeler v. United States*, 811 F.2d 549 (10th Cir. 1987) (the federal courts have stated that when a dispute is an intra-tribal matter, the federal government should not interfere); *Shenandoah v. United States Dep't of the Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998) (holding that a federal court did not have jurisdiction to determine which member of the Oneida Tribe was the proper tribal representative, as the question involved purely intra-tribal law).

A resolution of who constitutes the tribal council is a matter of internal tribal controversy between tribal members. The court finds that this issue concerns intra-tribal matters because the controversy solely involves tribal members and tribal funds, and the activities surrounding the controversy occurred solely on tribal land. An intra-tribal controversy is not something the federal court is able to decide. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *U.S. v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992); *U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122 (D. Nev. 2001). Thus, policies of tribal self-government and self-determination require that this court abstain from making any rulings related to the tribal council members. *U.S. Bancorp*, 171 F.Supp.2d 1122.

C. Tribal Exhaustion

When the court received the stipulated Court of Appeals decision, it seemed as though parties had settled, and that the wait to disburse the money was over (#147). However, despite all of the time and money spent by the parties, it appears that they are determined to prolong this process. The Bills group has challenged the subject matter jurisdiction of the stipulated Court of Appeals even though the Bills group fully participated in the negotiations to have the appeal heard before that forum. After the stipulated Court of Appeals rendered an unfavorable decision to the Bills group and after payment of $30, 847.32 to the stipulated Court of Appeals for its services (#155), the Bills group now raises for the first

time the issue of subject matter jurisdiction. Notwithstanding this troubling turn of events, federal case law indicates that subject matter jurisdiction may be challenged at any step of the court process.

Under the doctrine of tribal exhaustion, federal courts must "stay their hand" until tribal courts have had the opportunity to determine their own jurisdiction. *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845 (1985). At a minimum, the exhaustion rule requires that tribal appellate courts have the opportunity to review determinations of the lower tribal courts. *Iowa Mut. Ins. Co v. LaPlante*, 480 U.S. 9, 17 (1987). Once tribal remedies are exhausted, the federal district court has jurisdiction to review the tribal court's finding of tribal jurisdiction. *Strate*, 520 U.S. at 451.

In *U.S. Bancorp*, two groups were vying to be declared the governing body of the Te-Moak Tribe. *U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122 (D. Nev. 2001). The District Court found that it did not have jurisdiction to decide which group was the governing body of the Te-Moak. *Id.* at 1125. However, the District Court held that it did have jurisdiction, *prior* to the exhaustion of tribal remedies, to determine whether the Court of Indian Offenses, which the Te-Moak Tribe used as a tribal court, had exceeded its jurisdiction in issuing a restraining order against one of the groups. *Id.* The District Court based its holding on the fact that the Court of Indian Offenses is a federal "C.F.R." court, established and administered by the Bureau of Indian Affairs. *Id.* Although the Te-Moak Tribe had

adopted the C.F.R. court into its constitution, the C.F.R. court retained federal aspects. These federal aspects, the District Court held, gave it jurisdiction to examine the C.F.R court's jurisdictional limits prior to tribal exhaustion. *Id.* The District Court found that had the C.F.R. court instead been purely a tribal court set up and run by the tribe with no federal government interference, the District Court would have had no jurisdiction to review the tribal court's jurisdiction prior to the exhaustion of tribal remedies. *Id.*

U.S. Bancorp is illustrative of the present case before the court. In the current case, the WIC tribal court is not a C.F.R. court, but is purely a tribal court, set up and run by the tribe. There is no federal interference or assistance running the WIC court. Thus, *U.S. Bancorp* is further evidence that this court does not have jurisdiction to examine the jurisdictional limits of the tribal court prior to the exhaustion of tribal remedies. This court must allow the tribal court process to complete itself, absent exceptions to the rule of tribal exhaustion, before it may determine whether the stipulated Court of Appeals had jurisdiction to hear the appeal.

The question now becomes whether the tribal remedies have been exhausted. If tribal remedies have been exhausted, this court has jurisdiction to review the jurisdiction of the stipulated Court of Appeals. The Wasson group argues that the tribal court process is complete since the parties stipulated to a final and binding Appellate Court decision (#163). The Bills group contends that parties can

never stipulate to the subject matter jurisdiction of a court where there is none (#165).[2] The Bills group further contends that it has numerous avenues of appeal such as: (1) a petition for re-hearing before the stipulated Court of Appeals on whether it had jurisdiction; (2) a ruling by the "correct" appellate court, the Inter-Tribal Court of Appeals of Nevada, on whether the stipulated Court of Appeals had jurisdiction; and/or (3) a ruling by the Inter-Tribal Court of Appeals of Nevada on the merits of the appeal, nullifying the work of the stipulated Court of Appeals entirely. *Id.*

In *Basil Cook Enterprises*, the plaintiff tribal members argued that there were no tribal remedies to exhaust because the tribal court was a nullity, since it had been created in contravention of the tribe's laws and constitution. *Id.* The court stated

> First, to hold that the St. Regis Mohawk Tribal Court is a nullity under the tribal constitution would require this court to construe tribal law. This we may not do. The Supreme

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[2] The court notes that the Bills group has cited to many federal practice treatises in their opposition (#151) and supplemental brief (#165) and that these general rules regarding the challenge to subject matter jurisdiction are only applicable to the federal courts. The same rules may not be applicable to the WIC tribal court system. However, while tribal law may have different rules concerning subject matter jurisdictional challenges, it has not been brought to this court's attention, and this court will not engage in the interpretation of the WIC constitution and code.

> Court has long recognized the exclusive responsibility of Native American tribes to construe their own law . . . and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions.

Id. at 65.

Like the plaintiffs in *Basil Cook Enterprises*, the Bills group contends that the stipulated Court of Appeals is a nullity because the court was contravened in violation of the WIC code and constitution (#165). However, like the court in *Basil Cook Enterprises*, this court cannot find that the stipulated Court of Appeals is a nullity since such a finding would require this court to interpret tribal law. The question of whether the stipulated Court of Appeals was convened properly under the WIC code and constitution are tribal law issues. Additionally, this court cannot rule on the jurisdiction of the stipulated Court of Appeals while tribal remedies remain.

Despite the fact that the court is loathe to let this process continue, especially considering the circumstances in which the partes have now managed to prolong the proceedings, the court finds that the tribal process has not been exhausted. While this court wonders whether this jurisdictional challenge would be brought had the Bills group won its case, the court reluctantly agrees that there are a few avenues of appeal left within the tribal court process. Whether those avenues of appeal are the proper ones procedurally is a question of tribal law, and will not be decided by this court unless tribal exhaustion has

occurred. The court is aware that the Bills group has appealed the jurisdictional question to various forums (#165). The Bills Group has filed a Petition for Re-Hearing on the subject of jurisdiction with the stipulated Court of Appeals. *Id.* Additionally, the court is informed that the Inter-Tribal Court of Appeals of Nevada has been re-convened and the process is "almost concluded" (#165, ex. 5). The Bills group states that they intend to file an appeal with this body (#165).

The court finds that the parties must first resolve this jurisdictional issue within the tribal court system. However, this court may review the exercise of jurisdiction, even if the underlying suit is between two tribal members, after tribal remedies have been exhausted. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991 (8th Cir. 1999). Thereafter, unless the federal court determines that the tribal court lacked jurisdiction, proper deference to the tribal court system precludes re-litigation of issues raised and resolved in the tribal court. *Crow Tribe of Indian v. Racicot*, 87 F.3d 1039 (9th Cir. 1996).

D. Exceptions to Tribal Exhaustion

As noted above, there are several exceptions to the rule of tribal exhaustion. In *National Farmers*, the Court stated that exhaustion would not be required where it would be "futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." 471 U.S. at 856, n. 21. It is possible that this exception may be applicable to this case.

By the Bills group's own admission, their "petition for Re-hearing before the Minnesota panel of attorneys has received absolutely no response from them" (#165). However, even if the groups re-convene the stipulated Court of Appeals, this court takes real issue with the idea that more of the Winnemucca Indian Colony's money will be spent on a jurisdictional challenge that could have been brought at the outset and that will most likely be dismissed. Additionally, the court notes that the Inter-Tribal Court of Appeals of Nevada, while on the road to being re-convened, may run into the type of roadblocks and delay commonly associated with government process.

In the event that the parties find themselves without an avenue of appeal within the time frame stated below, the court will consider arguments that the futility exception to the rule of tribal exhaustion applies. *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845 (1985). Any motions on this issue must include evidence, affidavits, and authenticated documents, in compliance with the Federal Rules of Evidence, showing the futility of pursuing the tribal court system. Upon such a motion, this court will reconsider the jurisdictional issue.

E. Stay of Proceedings

"As a Federal District Court, we have the inherent power to stay proceedings of an action, so as to control our docket, to conserve judicial resources, and to provide for just determination of cases which pend

before us." *Armstrong v. Mille Lacs County Sheriffs Dept.*, 112 F.Supp.2d 840 (D. Minn. 2000). There is no hard and fast rule on when parallel litigation should be stayed in the interests of judicial economy. *Professional Service Network, Inc. v. American Alliance Holding Co.*, 238 F.3d 897 (7th Cir. 2001). When comity among tribunals justifies giving priority to a particular suit, the other action should be stayed, rather than dismissed. *Central States, Southeast and Southwest Areas Pension Fund v. Paramount Liquor Co.*, 203 F.3d 442 (7th Cir. 2000).

Despite the fact that the court is reluctant to extend this case any longer, in the interests of tribal self-determination and self-government, the court will stay these proceedings for ninety (90) days from the date of the District Court's order in this case in an attempt to allow the Inter-Tribal Court of Appeals of Nevada and/or the stipulated Court of Appeals hear the issue of jurisdiction or the case on the merits. The court orders that a joint status report on the tribal court process be filed with this court forty-five (45) days from the date of the District Court's order in this case.

Because the court has decided to stay the proceedings until the tribal remedies can be exhausted, the Wasson group's motion for summary judgment is dismissed without prejudice as premature. *See Armstrong*, 112 F.Supp.2d at 840, n. 1. The court grants leave to re-submit this motion upon evidence of either tribal exhaustion or the valid application of one of the *National Farmers* exceptions to tribal exhaustion listed above.

IV. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that the doctrine of tribal exhaustion applies to this case, and will stay the proceedings accordingly.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this report and recommendation within ten days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This report and recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court stay the proceedings until tribal remedies have been exhausted.

IT IS FURTHER RECOMMENDED that defendant Wasson group's motion for summary judgment (#147) be **DISMISSED WITHOUT PREJUDICE** as premature. The Wasson group is given leave to re-submit the motion for summary judgment upon

motion to the court that tribal remedies have been exhausted or that tribal exhaustion is futile.

IT IS FURTHER RECOMMENDED that the parties files a joint status report on the tribal court process within forty-five (45) days from the date of the District Court's order in this case.

DATED: February 13, 2003.

/s/ Valerie P. Cooke
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BANK OF AMERICA, N.A., a Delaware corporation, Plaintiff(s), vs. WILLIAM BILLS, *et al.*, Defendant(s).	**CV-N-00-450-HDM (VPC)** **MINUTES OF THE COURT** **August 29, 2003**

PRESENT: HONORABLE HOWARD D. MCKIBBENS, U.S. DISTRICT JUDGE

Deputy Clerk:	**Bette Stewart**	**Reporter/ Recorder:**	**None Appearing**
Counsel for Plaintiff(s):		**None Appearing**	
Counsel for Dependant(s):		**None Appearing**	

MINUTE ORDER IN CHAMBERS:

This matter is currently pending before the Inter-Tribal Court of Appeals.

Accordingly, this case is administratively closed subject to being reopened upon disposition of the matter before the Inter-Tribal Court of Appeals or application of the parties.

IT IS SO ORDERED.

LANCE S. WILSON, CLERK

By: /s/ Bette Stewart
Deputy Clerk